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No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

HARVEY F. EUGE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Reasons for granting the petition	6
Conclusion	14
Appendix A	1a
Appendix B	4a
Appendix C	10a
Appendix D	12a

CITATIONS

Cases:

Donaldson v. *United States*, 400 U.S. 517	7, 11
Lopreato, In re, 511 F.2d 1150	12
Palmer v. *United States*, 530 F.2d 787	12
Reisman v. *Caplin*, 375 U.S. 440	9
United States v. *Bassman*, 40 A.F.T.R.2d 5990 (S.D. Iowa Sept. 1, 1977)	14
United States v. *Bisceglia*, 420 U.S. 141	7, 8, 9, 11
United States v. *Brown*, 536 F.2d 117	13
United States v. *Campbell*, 524 F.2d 604	5, 6, 10, 11, 12, 13
United States v. *Dionisio*, 410 U.S. 1	10, 11
United States v. *Ginsburg*, No. C 78-6028 (E.D. Ark. Jan. 8, 1979)	13

Cases—Continued — Page

United States v. *Hoopingarner*, 438 F. Supp. 366 14
United States v. *LaSalle National Bank*, 437 U.S. 298 11
United States v. *Lewis*, 42 A.F.T.R.2d 5821 (N.D. Tex. July 11, 1978) 13
United States v. *Mara*, 410 U.S. 19 ..... 10, 11
United States v. *Morton Salt Co.*, 338 U.S. 632 8
United States v. *Powell*, 379 U.S. 48 .....8, 9, 11
United States v. *Rosinsky*, 547 F.2d 249.. 6, 12

Constitution and statutes:

United States Constitution, Fourth Amendment 5, 10
Internal Revenue Code of 1954 (26 U.S.C.):

Section 7601 .....2, 6, 12a
Section 7602 .....2, 6, 7, 12, 12a
Section 7602(2) 12, 12a-13a
Section 7604 ..... 2, 13a
Section 7604(a) 4, 11, 13a
Section 7801(a) 6

28 U.S.C. 1826(a) 11, 13

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States of America and Patrick J. Finnessey, Special Agent of the Internal Revenue Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The order of the district court (App. A, *infra*, 1a-3a) is not reported. The opinion of the court of appeals (App. B, *infra*, 4a-9a) is reported at 587 F.2d 25.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 10a-11a) was entered on November 22, 1978. On February 8, 1979, Mr. Justice Blackmun entered an order extending the time within which to file a petition for a writ of certiorari to and including March 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Internal Revenue Service has statutory authority to issue a summons requiring a person to appear and execute handwriting exemplars in aid of an administrative investigation to determine his correct tax liability.

STATUTES INVOLVED

The pertinent provisions of Sections 7601, 7602, and 7604 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in Appendix D, *infra*, 12a-13a.

STATEMENT

1. In October 1977, Special Agent Patrick J. Finnessey of the Intelligence Division of the Internal Revenue Service was assigned, together with a revenue agent, to investigate respondent's income tax liabilities for the years 1973-1976. The case had been referred to him by the Audit and Collection Divisions of the Service after a search revealed that respondent had neither filed nor sought any extensions to file a

tax return for any of the years in question (App. B, *infra*, 7a; Tr. 3-6).[1] The Service had initially determined that respondent's primary source of income was from preparing tax returns (Tr. 5). An advertisement placed by respondent in the classified telephone directory read: "Euge, Harvey F., get 'em back money tax man, prepared in your home, appointment only. Tax review and rework makes you money" (Tr. 6).

In order to determine respondent's correct tax liability for the years under examination, the agents employed the bank deposits method of reconstructing his income. Under this well-established method of indirect proof, the Service scrutinizes bank deposits to determine whether they represent taxable income and subtracts any non-income items. The investigation disclosed that there were only two bank accounts in respondent's name. However, during his investigation, Special Agent Finnessey became aware that statements of 20 other bank accounts were sent to post office boxes in respondent's name, that the signature cards of these accounts listed addresses of properties owned by respondent, and that there were frequent transfers of funds between these accounts. These facts suggested to the agent that respondent had other bank accounts under aliases to conceal his taxable income (Tr. 7-8). For 1975 and 1976, the deposits in these other bank accounts were approximately $50,000 and $30,000, respectively (Tr. 9).

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[1] "Tr." refers to the transcript of proceedings in the district court held on April 10, 1978. We are lodging a copy of the transcript with the Clerk.

As a result of these disclosures, Agent Finnessey issued a summons to respondent requiring him to complete a standard IRS handwriting exemplar form and to execute exemplars of the various signatures on the bank signature cards. After receipt of this data, the Internal Revenue Service handwriting laboratory would be able to determine whether respondent had maintained bank accounts under assumed names (Tr. 10-12).

At the time Agent Finnessey served the summons on October 7, 1977, respondent told him that he would not obey it (Tr. 9-10; App. B, *infra*, 7a). Accordingly, the United States and Agent Finnessey commenced this action under 26 U.S.C. 7604(a) in the United States District Court for the Eastern District of Missouri to enforce the summons (App. B, *infra*, 7a-8a). At an evidentiary hearing held by the district court on April 10, 1978, Agent Finnessey testified with respect to the purpose of the investigation, the relevancy to that inquiry of the information sought by the summons, and the administrative procedures taken by him to obtain voluntary compliance (App. A, *infra*, 1a-2a). The agent stated that "[w]e need [the handwriting] exemplars to match the signature cards for the accounts" (Tr. 10) so that the Service could establish whether respondent was maintaining bank accounts under assumed names. At the request of the attorney for the government, the agent prepared a list of aliases that he required in order to complete his investigation (Tr. 11).

The district court ordered the summons enforced. Specifically, it ordered respondent to complete the Treasury Department Handwriting Exemplars form to be submitted by Agent Finnessey, and to provide 10 handwriting exemplars of eight different signatures (App. A, *infra*, 2a).

The court of appeals reversed (App. B, *infra*, 4a-9a). By a 7-1 *en banc* vote, it overruled its prior (divided) panel decision in *United States* v. *Campbell*, 524 F.2d 604 (1975), which had held that "[t]he Commissioner's statutory authority to summon 'other data' under Title 26, U.S.C., § 7602(2), includes the authority to require the taxpayer to give exemplars of her handwriting" (*id.* at 607). After reviewing the conflicting authorities (see App. B, *infra*, 8a-9a), the court of appeals concluded that "the view expressed in the dissenting opinion in *Campbell* is the preferable one and should be followed in this case and in the future unless the Supreme Court holds otherwise or unless Congress changes the law" (*id.* at 9a; footnote omitted). The view of the dissent in *Campbell* adopted by the court was that the compelled execution of a handwriting exemplar is a search and seizure within the meaning of the Fourth Amendment and that "[t]hose charged with investigative and prosecutorial duties should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks" (524 F.2d at 609).

The dissenting judge in the instant case would have enforced the summons "for all of the reasons

expressed in [the majority opinion in] *United States* v. *Campbell*, [*supra*]" (App. B, *infra*, 9a). As that decision observed, Sections 7601 and 7602 of the Code gave the Internal Revenue Service a broad mandate to investigate and audit persons who may be liable for taxes and the fact that an internal revenue summons can be enforced only by the courts after an adversary proceeding provides substantial protections aaginst abuse (see 524 F.2d at 607).

REASONS FOR GRANTING THE PETITION

The court of appeals wrongly decided an issue of major importance to the conduct of federal tax investigations, and its decision conflicts with that of the Fourth Circuit in *United States* v. *Rosinsky*, 547 F.2d 249 (1977).

1. The court of appeals' ruling that the Secretary's summons power does not extend to requiring a person to appear and execute handwriting exemplars in aid of a tax investigation has no basis in either the statutory text or in tax enforcement policy.

The Internal Revenue Service is organized to carry out the broad responsibilities of the Secretary of the Treasury, as set forth in Section 7801(a) of the Internal Revenue Code of 1954, to administer and enforce the internal revenue laws. Our tax collection system depends primarily upon honest self-reporting. However, in order to encourage and supplement accurate and conscientious self-reporting by all taxpayers, Congress has directed the Internal Revenue Service in Section 7601 of the Code to canvass "each

internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax" (App. D, *infra*, 12a). See also *Donaldson* v. *United States*, 400 U.S. 517, 523-524 (1971).

In discharging this duty to canvass and to inquire, the Internal Revenue Service has been granted broad statutory powers to examine books and witnesses through the issuance of summonses. Specifically, Section 7602 authorizes the Secretary or his delegate "[t]o examine any books, papers, records, or other data which may be relevant or material to such inquiry; * * * [and] [t]o summon * * * any person having possession, custody, or care of books of account * * * or any other person * * * to appear before the Secretary * * * at a time and place named in the summons and to produce such books, papers, records, or other data, * * * as may be relevant or material to such inquiry * * *" (App. D, *infra*, 12a-13a).

This Court has consistently recognized that effective, and therefore fair, administration of the tax laws requires that internal revenue agents not be fettered in their good faith use of the investigatory tools that Congress has provided them to determine the liability of taxpayers. In holding in *United States* v. *Bisceglia*, 420 U.S. 141 (1975), that the Internal Revenue Service has the statutory authority to issue a "John Doe" summons to a bank or other depository to discover the identity of a person who may be liable for unpaid taxes, the Court observed that "[i]t would seem elementary that no meaningful investiga-

tion of such events could be conducted if the identity of the persons involved must first be ascertained, and that is not always an easy task. * * * [I]f criminal activity is afoot the persons involved may well have used aliases or taken other measures to cover their tracks. Thus, if the Internal Revenue Service is unable to issue a summons to determine the identity of such persons, the broad inquiry authorized by § 7601 will be frustrated in this class of cases" (*id.* at 150).

The Court's opinion in *Bisceglia* relied in large part upon the analogy between the Commissioner's summons power and the authority of the grand jury to compel production of evidence. As the Court noted, "had respondent been brought before a grand jury under identical circumstances there can be little doubt that he would have been required to testify and produce records or be held in contempt" (*id.* at 147). In support of this proposition, the Court cited its earlier statement in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950), quoted thereafter with approval in *United States* v. *Powell*, 379 U.S. 48, 57 (1964), that the subpoena power of federal enforcement agencies is "more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." The summons authority of the Internal Revenue Service is essentially identical to the broad inquisitorial powers of the other federal enforcement agencies. "While the

power of the Commissioner of Internal Revenue derives from a different body of statutes, we do not think the analogies to other agency situations are without force when the scope of the Commissioner's power is called into question." *United States* v. *Powell*, *supra*, 379 U.S. at 57 (footnote omitted).

Finally, the Court noted in *Bisceglia* (420 U.S. at 146) that Congress has afforded summoned parties substantial protection by providing that an internal revenue summons is not self-executing but can be enforced only by the courts. See Section 7604(a). Thus, before the Commissioner can compel the production of evidence or the appearance of a witness, the summoned party is entitled to an adversary proceeding to consider his objections to enforcement. At the hearing he "may challenge the summons on any appropriate ground." *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964). "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *United States* v. *Powell*, *supra*, 379 U.S. at 58 (footnote omitted). After reviewing the pertinent authorities, the Court in *Bisceglia* concluded (420 U.S. at 146-147) that "[t]he cases show that the federal courts have taken seriously their obligation to apply this standard to fit particular situations, either by refusing enforcement

or narrowing the scope of the summons. See, *e.g.*, *United States* v. *Matras*, 487 F.2d 1271 (CA8 1973); *United States* v. *Theodore*, 479 F.2d 749, 755 (CA4 1973); *United States* v. *Pritchard*, 438 F.2d 969 (CA5 1971); *United States* v. *Dauphin Deposit Trust Co.*, 385 F.2d 129 (CA3 1967)."

2. In holding that the Internal Revenue Service has no statutory authority to issue a summons compelling the execution of handwriting exemplars, the court of appeals overruled its prior decision in *United States* v. *Campbell*, *supra*, and adopted the view expressed in the dissenting opinion in that case.

But the dissent in *Campbell* was based on the erroneous premise that a summons requiring handwriting exemplars is a search and seizure within the meaning of the Fourth Amendment. As this Court made clear in *United States* v. *Dionisio*, 410 U.S. 1 (1973), and *United States* v. *Mara*, 410 U.S. 19 (1973), a grand jury subpoena requiring appearance is not a "seizure" within the meaning of the Fourth Amendment and that Amendment is not violated by a directive compelling production of "physical characteristics" that are "constantly exposed to the public" (410 U.S. at 9, 14) such as voice or handwriting exemplars. "Handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice" (*id.* at 21). The Court therefore held in *Mara* that "[t]he specific and narrowly drawn directive requiring the witness to furnish a specimen of his

handwriting violated no legitimate Fourth Amendment interest" (*id.* at 22; footnote omitted).

Given the analogy between the grand jury subpoena and the internal revenue summons, there is no basis for the rejection by the dissent in *Campbell* of the precedential force of *Mara* and *Dionisio* to the question presented in the instant case. The dissenting judge in *Campbell*, whose view was adopted by the decision below, stated that the analogy was "unconvincing" because "[t]here is no direct supervision of an Internal Revenue Service investigation by a judge or other neutral judicial officer as there is of a grand jury" (524 F.2d at 609).

But just as a grand jury subpoena can be enforced only by a court, the Internal Revenue Service can compel compliance with its summonses only by invoking the jurisdiction of the federal district court. See 26 U.S.C. 7604(a). Moreover, the rules set forth in this Court's decisions in *United States* v. *Powell*, *supra*; *Donaldson* v. *United States*, *supra*; and most recently in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), for enforcement of an IRS summons, eliminate the possibility of abuse of this vital investigative tool. The analogy between the grand jury subpoena and the internal revenue summons is therefore sound. In both cases, "Congress has provided protection from arbitrary or capricious action by placing the federal courts between the Government and the person summoned." *United States* v. *Bisceglia*, *supra*, 420 U.S. at 151. Cf. 28 U.S.C. 1826(a). The constitutional concerns evinced by the

court below with respect to summoned production of handwriting exemplars are accordingly groundless.

3. The foregoing considerations have led the Fourth Circuit in *United States* v. *Rosinsky, supra,* to uphold enforcement of the type of summons at issue here. *Rosinsky* involved a summons requesting a person under investigation to complete handwriting exemplars to enable the Internal Revenue Service to determine whether he issued certain invoices and cashed certain checks. In upholding enforcement of the summons, the Fourth Circuit concluded that the authority in 26 U.S.C. 7602(2) to require the witness to "appear" "impliedly carries with it the power to require certain nontestimonial acts on the part of the witness such as providing handwriting or voice exemplars" (547 F.2d at 252). As the court reasoned, "[s]ince the power under the § 7602 summons is 'essentially the same as the grand jury's,' it seems obvious that * * * the appellant may be compelled * * * to give handwriting exemplars" (*id.* at 252-253).

Moreover, *Rosinsky* found the reasoning of the panel decision in *United States* v. *Campbell, supra,* overruled by the decision below, "consonant with what the Supreme Court later said in *Bisceglia* * * *" (547 F.2d at 253 n.3). In *Campbell,* the Eighth Circuit had previously held that handwriting exemplars fell within the term "other data" in 26 U.S.C. 7602.[2]

[2] Cf. *Palmer* v. *United States,* 530 F.2d 787, 789 (8th Cir. 1976), and *In re Lopreato,* 511 F.2d 1150, 1153-1154 (1st Cir. 1975). These decisions hold that handwriting exemplars are "other information" or "other material" under 28 U.S.C. 1826(a), the statute authorizing district courts to compel compliance with grand jury subpoenas and court orders "to testify or provide other information, including any book, paper, document, record, recording or other material."

On the other hand, in holding that the Service's summons power does not extend to handwriting exemplars, the Sixth Circuit in *United States* v. *Brown,* 536 F.2d 117, 121-122 (1976), which the decision below characterized as reaching "[t]he directly opposite result" from *Campbell* (App. B, *infra,* 8a), rejected that construction of the statute. Thus, as matters now stand, the type of summons at issue in this case is enforceable in the Fourth Circuit but not in the Sixth or Eighth Circuits.

4. The question presented is important to the administration and enforcement of the revenue laws. Without the power to require the execution of handwriting exemplars, the Internal Revenue Service cannot effectively conduct investigations in cases where, as here, a determination of the identity of the author of documents is critical to the inquiry. We are advised by the Internal Revenue Service that handwriting exemplars have been used in the investigation of 320 cases during the 18-month period ending on December 6, 1978. In a number of these cases, handwriting exemplars were produced voluntarily.[3] How-

[3] The question whether the Internal Revenue Service may compel the execution of handwriting exemplars is producing an increasing amount of litigation. See *United States* v. *Ginsburg,* No. C 78-6028 (E.D. Ark. Jan. 8, 1979); *United States* v. *Lewis,* 42 A.F.T.R.2d 5821 (N.D. Tex. July 11, 1978);

ever, if the decision below is permitted to stand, it may be expected that voluntary production of handwriting exemplars will decline and many investigations into suspected tax abuse will thereby be adversely affected.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1979

United States v. *Hoopingarner*, 438 F. Supp. 366 (N.D. N.Y. 1977); *United States* v. *Bassman*, 40 A.F.T.R.2d 5990 (S.D. Iowa Sept. 1, 1977).

* The Solicitor General is disqualified in this case.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 78-MISC-0004-C

UNITED STATES OF AMERICA and PATRICK J. FINNESSEY, Special Agent of the Internal Revenue Service, PETITIONERS

v.

HARVEY F. EUGE, RESPONDENT

ORDER

This matter comes before the Court upon the Petition to Enforce Internal Revenue Service Summons, brought by the United States of America on behalf of the Internal Revenue Service, and Patrick J. Finnessey, a Special Agent of the Internal Revenue Service. On April 10, 1978, an evidentiary hearing was held. Prior to this hearing, the United States filed a Motion to Suspend and Limit Discovery, and a Motion to Quash Notice to Take Deposition, with a supporting memorandum of law. Thereafter, respondent Euge filed a Motion to Compel Discovery and for Continuance to Permit Discovery, with a supporting memorandum.

At the evidentiary hearing on April 10, 1978, Special Agent Finnessey testified to the purpose of the investigation of respondent, the relevancy of the information sought by the Internal Revenue Service

Summons to that inquiry, and the administrative procedures taken to obtain voluntary compliance with the summons. The witness was cross-examined by counsel for the respondent, and by this Court.

Having examined the pleadings and memoranda filed by the parties hereto, and having heard the testimony of Petitioner Finnessey,

IT IS HEREBY ORDERED that the Motion of Petitioners to Suspend and Limit Discovery, and the Motion to Quash Notice to take Deposition, be granted;

IT IS FURTHER ORDERED that the respondent's Motion to Compel Discovery and for Continuance to Permit Discovery, be denied;

IT IS FURTHER ORDERED that respondent Harvey F. Euge obey the Internal Revenue Service Summons dated October 7, 1977, by providing handwriting exemplars in the following manner:

(a) By completion of the Department of the Treasury Handwriting Exemplars form to be provided by Special Agent Patrick J. Finnessey, and

(b) By providing ten handwriting exemplars of the following signatures: (1) Robert Wells, (2) Sam Flanders, (3) Richard Sappington, (4) Larry R. Anderson, (5) James I. Campbell, (6) Frank J. Rollins, (7) John M. Leadbetter, and (8) John L. Neals. These exemplars shall be given in the manner and form prescribed by Special Agent Patrick J. Finnessey.

IT IS FURTHER ORDERED that respondent Harvey F. Euge comply with the terms of this Order within ten days.

Dated this 13th day of April, 1978.

/s/ H. Kenneth Wangelin
H. KENNETH WANGELIN
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1284

UNITED STATES OF AMERICA and PATRICK J. FINNESSEY, Special Agent for the Internal Revenue Service, APPELLEES

v.

HARVEY F. EUGE, APPELLANT

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: October 18, 1978

Filed: November 22, 1978

Before GIBSON, Chief Judge, LAY, HEANEY, BRIGHT, ROSS, STEPHENSON, HENLEY and McMILLIAN, Circuit Judges, *En Banc.*

HENLEY, Circuit Judge.

This appeal which comes to us from the United States District Court for the Eastern District of Missouri [1] raises again the question of whether § 7602 of the Internal Revenue Code, 26 U.S.C. § 7602, authorizes the Internal Revenue Service to require a taxpayer whose potential tax liabilities are under investigation to appear before a Special Agent of the Service and to furnish multiple handwriting exemplars to the Special Agent for comparison purposes. A majority of this court answered that question in the affirmative in *United States* v. *Campbell*, 524 F.2d 604 (8th Cir. 1975).[2] The question having recurred in this case, the court deemed it well to hear this appeal *en banc* and has done so.

26 U.S.C. § 7602 is as follows:

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of an internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

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[1] The Honorable H. Kenneth Wangelin, United States District Judge.

[2] The decision in *Campbell* was by a divided court. In due course rehearing and rehearing *en banc* were denied. *Campbell* was cited by us as authority in *Palmer* v. *United States*, 530 F.2d 787, 789 (8th Cir. 1976), a case involving the power of a federal grand jury to require a witness to provide handwriting exemplars.

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Where a taxpayer fails or refuses to obey an administrative subpoena issued by an agent of the IRS, the subpoena may be enforced by a judicial proceeding in the appropriate district court as provided by 26 U.S.C. § 7604, which is as follows:

> (a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

> (b) Enforcement.—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States Commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

There is no dispute about the facts of the case. In October, 1977 Special Agent Finnessey was investigating the tax obligations of respondent Harvey F. Euge for the tax years 1973, 1974, 1975 and 1976, and in connection with that investigation Special Agent Finnessey served a subpoena on Euge pursuant to § 7602 commanding the taxpayer to appear and furnish handwriting exemplars.

Respondent advised the Special Agent that he had no intention of complying with the subpoena and did not do so. This action was commenced under § 7604

on January 12, 1978; an order to show cause was issued by the district court on January 13. Various proceedings were had in the district court in connection with discovery that respondent desired to pursue.

On April 13, 1978 the district court entered an order resolving the discovery issues against the respondent and ordering the respondent to comply with the subpoena within ten days. This appeal followed.

The question of whether § 7602 authorizes the IRS to require a taxpayer to create a document by giving handwriting exemplars as contrasted to the question of whether the Service can compel the taxpayer to produce for examination an existing piece of writing or document has not been free from doubt, and, as has been noted, it divided this court in *Campbell*, *supra*, in 1975.

In coming to its conclusion in *Campbell*, the majority of the court analogized the power of the Service to compel the giving of handwriting exemplars to the corresponding power of a federal grand jury. *See United States* v. *Mara*, 410 U.S. 19 (1973); *Palmer* v. *United States*, 530 F.2d 787 (8th Cir. 1976).

The Court of Appeals for the Fourth Circuit took the same approach that the majority of this court took in the *Campbell* case in *United States* v. *Rosinsky*, 547 F.2d 249 (4th Cir. 1977). The directly opposite result was reached in *United States* v. *Brown*, 536 F.2d 117 (6th Cir. 1976). The *Brown* case was cited with approval in somewhat different context in *United States* v. *Davey*, 543 F.2d 996,

1000 (2d Cir. 1976), wherein it was said that § 7602 does not require "preparation or production of records not yet in existence."

This *en banc* court has given the problem careful consideration, and we conclude that the view expressed in the dissenting opinion in *Campbell* is the preferable one and should be followed in this case and in the future unless the Supreme Court holds otherwise or unless Congress changes the law.[3]

Other questions raised by respondent do not survive our determination of the basic question.

The order of the district court is reversed, and the cause is remanded with directions that the administrative subpoena or summons be quashed.

STEPHENSON, Circuit Judge, dissenting.

I respectfully dissent for all of the reasons expressed in *United States* v. *Campbell*, 524 F.2d 604 (8th Cir. 1975).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

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[3] Our holding is limited to the precise question before us, namely, whether or not the IRS has the authority under the statute here involved to compel a taxpayer to create out of thin air handwriting exemplars by using his brain, eyes and hand. We do not have here any question of the authority of the Service to require a taxpayer to retrieve raw data, such as that which may be in the workings of a computer. *Cf. United States* v. *Davey*, *supra*, 543 F.2d 996.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1284

SEPTEMBER TERM, 1978

UNITED STATES OF AMERICA and PATRICK J. FINNESSEY, Special Agent for Internal Revenue Service, APPELLEES

vs.

HARVEY F. EUGE, APPELLANT

JUDGMENT

APPEAL FROM the United States District Court for the Eastern District of Missouri.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the Eastern District of Missouri and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court with directions in accordance with this Court's majority opinion.

Costs taxed in favor of Appellant:

Costs of reproducing brief:	$ 63.00
Costs of reproducing reply brief:	$ 47.25
Total costs of Appellant for recovery from Appellee in the U.S. District Court:	$110.25

A true copy:

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

/s/ Robert A. Tucker

November 22, 1978

APPENDIX D

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.

(a) *General Rule.*—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

SEC. 7602. EXAMINATIONS OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the

business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

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